IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LISA SHARDON and	§	
ANGELO DEFILIPPO,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**CIVIL ACTION 3:14-CV-01171-B**
	§	
WELLS FARGO BANK, N.A. as Trustee	§	
for CARRINGTON MORTGAGE LOAN	§	
TRUST, SERIES 2007-FREI ASSET	§	
BACKED PASS-THROUGH	§	
CERTIFICATES and	§	
	§	
JPMORGAN CHASE BANK, N.A.	§	
	§	
Defendants.	§	

PLAINTIFFS' BRIEF IN SUPPORT OF SECOND MOTION TO COMPEL AND MOTION FOR SANCTIONS

TABLE OF CONTENTS

I. INTRODUCTION 5

II. FACTS 6

III. ARGUMENT & AUTHORITIES 12

A. Plaintiffs are entitled to Defendants' disclosures under Fed. R. Civ. P. 26. 15

B. Plaintiffs are entitled to appropriate discovery responses and production relevant to Plaintiffs' loan account under Fed. R. Civ. P. 26(b) and 34. 16

C. Plaintiffs are entitled to discovery regarding Chase's policies and procedures related to servicing Plaintiffs' mortgage loan. 17

D. Plaintiffs are entitled to discovery regarding Chase's policies and procedures related to responding to Qualified Written Requests and Requests for Information. 18

E. Plaintiffs are entitled to discovery regarding Chase's policies and procedures related to processing and evaluating loan modification applications. 19

F. Plaintiffs are entitled to discovery regarding Chase's policies and procedures related to communicating with borrowers represented by counsel. 20

G. Plaintiffs are entitled to discovery regarding Chase's policies and procedures for recording and retaining audio recordings of conversations with borrowers. 21

H. Plaintiffs are entitled to discovery regarding Wells Fargo's policies and procedures regarding oversight by Wells Fargo of the entities servicing Plaintiffs' mortgage loan. 21

I. Plaintiffs are entitled to discovery regarding Chase's policies and procedures related to the acceleration of Plaintiffs' mortgage loan. 22

J. Plaintiffs are entitled to discovery regarding the identities of Chase's representatives involved in the processing and consideration of Plaintiffs' loan modification applications, QWRs, default and acceleration letters, and other dispute correspondence. 22

K. Plaintiffs are entitled to discovery regarding the Massachusetts class action concerning Chase's loan modification practices. 23

L. Plaintiffs are entitled to information regarding investor modification guidelines applicable to Plaintiffs' mortgage loan. 24

IV. REQUEST FOR SANCTIONS 24

A. Sanctions are appropriate under Fed. R. Civ. P. 37(b) due to Defendants' failure to comply with the Court's November 3, 2014 and September 11, 2015 orders. 24

B. Sanctions are appropriate under Fed. R. Civ. P. 37(c) due to Defendants' failure to provide required disclosures under Fed. R. Civ. P. 26(a). 26

V. CONCLUSION 26

VI. PRAYER 26

TABLE OF AUTHORITIES

Cases

Blankenchip v. CitiMortgage, Inc., 2015 WL 5009079 at *2-4 (E.D. Cal. Aug. 20, 2015) 14
BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996) 14, 15
Chao v. Primary Health Services Center, 2008 WL 2271485, at *1 (W.D. La. May 30, 2008) 10
Church v. Accretive Health, Inc., 2015 WL 7572338 at 2* (S.D. Ala. November 24, 2015) 13
Dondi Properties Corp. v. Commerce Savings & Loan Ass'n, 121 F.R.D. 284 (N.D. Tex. 1988) 21
Heller v. City of Dallas, 303 F.R.D. 466 (N.D. Tex. 2014) 12, 21
Hunter v. Green Tree Servicing, LLC (In re Hunter), 2014 WL 4555638 at *3 (Bankr. D.S.C. Sept. 12, 2014) 15
In re Natta, 264 F.Supp. 734 (D.C.Del.1967), *aff'd* 388 F.2d 215 (3rd Cir. 1968) 10
In re Terra Int'l, Inc., 134 F.3d 302, 306 (5th Cir. 1998) 10
Lopez v. Portfolio Recovery Associates, LLC (In re Lopez), 2015 W.L. 5438850 at *3-5 (Bankr. S.D. Tex. Sept. 14, 2015) 20
Merrill v. Waffle House, Inc., 227 F.R.D. 475, 478 (N.D. Tex. 2005) 10
National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976) 21
Natta v. Zletz, 405 F.2d 99 (7th Cir. 1968), *cert. denied* 395 U.S. 909 (1968) 10
Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) 9
Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3rd Cir. 1994) 11
Paul v. Sinnott, 217 F.Supp. 84 (W.D. Pa.1963) 10
Plascencia v. BNC Mortgage, Inc. (In re Plascencia), 2012 WL 2161412 at * 7 (Bankr. N.D. Cal. June 12, 2012) 15
Quimby v. Caliber Home Loans, 2015 WL 3751511 at *2 (S.D. Ind. Apr. 22, 2015) 15
U.S. v. National Steel Corp., 26 F.R.D. 603 (S.D. Tex. 1960) 10
United States v. Holley, 942 F.2d 916, 924 (5th Cir. 1991) 10

Statutes

12 U.S.C. § 2605(f)(1) 15
15 U.S.C. § 1692e 19
FDCPA .... passim
RESPA .... passim
TDCA 2, 17, 19
Tex. Const. Art. XVI § 50(a)(6) 16
TILA 2, 3, 11, 15

Rules

Fed. R. Civ. P. 26 .... passim
Fed. R. Civ. P. 26(a) .... passim
Fed. R. Civ. P. 26(b) 10, 12, 13, 21
Fed. R. Civ. P. 26(c) 10
Fed. R. Civ. P. 34 12
Fed. R. Civ. P. 30(b)(6) .... passim
Fed. R. Civ. P. 37(b) 21, 22
Fed. R. Civ. P. 37(c) 22

TO THE HONORABLE UNITED STATES MAGISTRATE JUDGE:

COME NOW, Lisa Shardon and Angelo DeFilippo, Plaintiffs in the above-captioned proceeding, and hereby file their Brief in Support of their Second Motion to Compel and Motion for Sanctions. In support hereof, Plaintiffs would respectfully show the Court:

I. INTRODUCTION

1. Plaintiffs and Defendants Wells Fargo Bank, N.A., as Trustee for Carrington Mortgage Loan Trust, Series 2007-FREI Asset Backed Pass-Through Certificates ("Wells Fargo") and JPMorgan Chase Bank, N.A. ("Chase") (collectively, the "Parties") have been engaged in an ongoing discovery dispute that has significantly delayed the completion of discovery in this case. The Parties have been at an impasse ***for more than a year*** with regard to whether Defendants must produce information requested by the Plaintiffs, which is essential to support Plaintiffs' case.

2. Consistent with the Court's September 11, 2015 order, Plaintiffs have engaged in lengthy, good faith discussions with Defendants to try to resolve the still-disputed discovery issues, and many of the issues presented to the Court in the Parties' original discovery motions (Docket Nos. 22 and 27) have indeed been resolved by agreement. However, as indicated in the Parties' October 9, 2015 Joint Status Report (Docket No. 54), critical issues remain regarding Defendants' failure and refusal to produce, as a matter of policy, requested documents and allow for meaningful testimony on previously agreed-upon and noticed deposition topics.

3. Among Plaintiffs' most fundamental allegations in this case is that Defendants considered Plaintiffs' loan to be ineligible for modification at the same time that Defendants actively encouraged Plaintiffs to seek modification and directed Plaintiffs to stop making their regular mortgage payments in order to "qualify" for a modification Chase knew or should have known it would never grant to Plaintiffs. Nevertheless, Defendants refuse to produce any

documents regarding Defendants' knowledge and policies regarding modifications of Texas home equity loans from the applicable time frame. Clearly, this information is crucial to Plaintiffs' claims in this case.

4. Additional information sought by Plaintiffs in discovery in this case is essential to Plaintiffs' claims under the Fair Debt Collection Practices Act ("FDCPA"), Texas Debt Collection Act ("TDCA"), Real Estate Settlement Procedures Act ("RESPA"), and the Truth In Lending Act ("TILA"). For instance, servicing notes, call recordings, and applicable policies and procedures from the relevant time period, all of which Defendants have refused to produce, are relevant to proving Defendants' direct debt collection efforts toward Plaintiffs after Defendants were notified Plaintiffs were represented by counsel, and whether Defendants had and followed policies and procedures that should have prevented Defendants from doing so is dispositive on Defendants' bona fide error affirmative defense.

5. Accordingly, in light of Defendants' continued refusal to produce the discovery Plaintiffs require, Plaintiffs now file this Second Motion to Compel and Motion for Sanctions.

II. FACTS

6. Plaintiffs filed suit against Defendants on February 25, 2014, in Dallas County District Court. In short, the suit alleges that Defendants never formally approved or denied Plaintiffs' multiple applications for loan modifications, failed to send Plaintiffs' regular mortgage statements, refused to accept payments, and refused to provide any explanation for their actions over the course of four years, leaving Plaintiffs in a perpetual mortgage purgatory and culminating in Defendants' attempts to dispossess Plaintiffs of their home and severely damage their credit. Plaintiffs allege that Defendants' conduct and communication with Plaintiffs violates federal and

state debt collection laws, RESPA, and TILA, and constitutes a breach of contract, common law fraud, negligence, and gross negligence.

7. On March 21, 2014, both Defendants filed answers in Dallas County District Court generally denying all of Plaintiffs' factual allegations.

8. On April 2, 2014, Defendant JPMorgan Chase Bank, N.A. ("Chase") removed the case to the United States District Court for the Northern District of Texas, Dallas Division. Docket No. 1.

9. On May 12, 2014, the parties filed an amended status report and estimated that discovery could be completed by September 30, 2014. Docket No. 8.

10. Defendants failed to make initial disclosures within thirty days from the date of the Judge's status report order as required by Rule 26(a)(1). In fact, to date, Defendants have failed to make any Rule 26 initial disclosures despite having been advised of this deficiency as recently as December 16, 2015.

11. Hoping to avoid costly and prolonged litigation, Plaintiffs repeatedly attempted to engage Defendants in settlement discussions, but by August 27, 2014, no settlement was ever offered by Defendants, so Plaintiffs served Defendants Chase and Wells Fargo with separate requests for production, requests for admissions, and interrogatories. *See* Exhibits A and B. The requests seek discovery necessary for Plaintiffs to prove each element of their causes of action. Defendants' discovery responses were due on September 26, 2014.

12. At Defendants' request, Plaintiffs agreed to extend Defendants' deadline to respond to December 8, 2014. The parties also agreed to file a motion to extend the discovery deadline in this case until January 31, 2015. *See* Docket No. 10.

13. The Court granted the parties' motion to extend case deadlines on November 3, 2014. *See* Docket No. 11.

14. On December 8, 2014, Defendants served their original responses to Plaintiffs' discovery requests, which consisted largely of boilerplate objections. *See* Exhibits C and D.

15. Without first conferring with Plaintiffs' counsel, Defendants also filed a frivilous motion "for protective order" on December 8, 2014, noting that Defendants had served responses and objections to Plaintiffs' discovery requests and therefore filed the motion "in anticipation of disputes arising out of" such responses. Docket No. 13.

16. Also on December 8, 2014, Defendant Chase produced 5,385 pages of documents in connection with their responses to Plaintiffs' requests for production. Of the 5,385 pages, Chase repeatedly produced multiple copies of several documents and refused to produce documents responsive to several of Plaintiffs' requests.[1]

17. Meanwhile, Defendant Wells Fargo has never produced any documents in response to Plaintiffs' discovery requests.

18. Further, Defendants agreed in their initial discovery responses to produce "confidential or proprietary information...after the entry of a protective order." Exhibits C and D, General Objections at ¶ 6.[2]

19. Defendants have never offered Plaintiffs a proposed form of protective order, nor have Defendants sought and obtained a protective order from the Court in this case.

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[1] *See* Exhibit E, Plaintiffs' summary of documents produced by Chase multiple times.

[2] Defendants removed this language from its most recent responses to Plaintiffs' Requests for Production.

20. On January 16, 2015, the parties again requested that the Court extend the discovery deadline to March 30, 2015, in order to allow settlement discussions to continue. *See* Docket No. 15.

21. The Court granted the motion to extend case deadlines on January 20, 2015. Docket No. 16.

22. On January 29, 2015, Plaintiffs served Defendants with deposition notices for each of Defendants' corporate representatives. Plaintiffs' counsel had previously requested on December 9, 2014, that Defendants provide proposed dates for Defendants' Rule 30(b)(6) witnesses' depositions, but Defendants failed to respond. As a result, Plaintiffs noticed the 30(b)(6) depositions for February 12, 2015, while also specifically offering to reschedule if Defendants would provide Plaintiffs' counsel with acceptable alternative dates. *See* Exhibits F and G.

23. In addition to serving the deposition notices, Plaintiffs' counsel emailed Defendants' counsel on January 29, 2015, offering to enter into an agreed protective order and attaching a proposed form of protective order for Defendants' review. *See* Exhibit H. As of the date of this Motion, Defendants have never provided any feedback to Plaintiffs regarding the proposed form of protective order.

24. On February 6, 2015, at Defendants' request, Plaintiffs served Defendants with amended deposition notices that included topics for the 30(b)(6) depositions. Exhibits I and J. Plaintiffs did not change the February 12, 2015, date for the depositions at that time, but Plaintiffs offered, once again, to reschedule the 30(b)(6) depositions if Defendants would provide Plaintiffs' counsel with acceptable alternative dates in a timely manner.

25. Defendants' counsel emailed Plaintiffs' counsel on Sunday, February 8, 2015, indicating that Defendants intended to file a motion for protective order regarding the February

12, 2015, depositions on the grounds that the topics in the amended deposition notice were too broad and that Defendants' representatives would not have adequate time to review the deposition notices and designate an appropriate representative before February 12, 2015.

26. Defendants filed their motion for protective order on February 9, 2015. Docket No. 17.

27. On February 10, 2015, Plaintiffs' counsel contacted Defendants' counsel regarding the relief requested in the motion for protective order, and, after extensive discussion, the parties were able to agree to more specific deposition topics. Plaintiffs served Defendants with second amended deposition notices on February 10, 2015. Exhibits K and L.

28. Also on February 10, 2015, Plaintiffs' counsel sent Defendants' counsel an email confirming the parties' agreement that Plaintiffs' prior deposition notices were withdrawn and replaced with the February 10, 2015, notices, and that Defendants agreed to withdraw the motion for protective order. Exhibit M. Plaintiffs' counsel specifically requested that, if Defendants had any additional concerns regarding the topics, that Defendants' counsel contact Plaintiffs' counsel prior to filing another motion for protective order. *See id.*

29. Defendants withdrew their motion for protective order on February 12, 2015. Docket No. 19.

30. On February 16, 2015, Defendants' counsel contacted Plaintiffs' counsel via email, stating that Chase could produce a witness for deposition on March 5, 2015. Exhibit N. Plaintiffs served Defendants with third amended deposition notices on February 25, 2015. Exhibits O and P.

31. Plaintiffs' counsel conducted a meet-and-confer conference regarding Defendants' discovery responses with Defendants' current counsel on February 26, 2015. Defendants' prior

counsel confirmed that his client was still unwilling to produce the majority of the discovery Plaintiffs sought and indicated that he would discuss Plaintiffs' counsel's proposals to limit the scope of the requests for production with his clients.

32. Defendants filed another motion for protective order on March 4, 2015. Docket No. 22.

33. Plaintiffs filed their motion to compel on March 25, 2015. Docket No. 27.

34. Following a hearing on Defendants' March 4, 2015 motion for protective order and Plaintiffs' March 25, 2015 motion to compel (collectively, "the Discovery Motions"), the Court entered its Order on September 11, 2015 directing the Parties to attempt to resolve all disputes related to the Discovery Motions and to file a status report regarding any disputes remaining unresolved. Docket No. 48.

35. As a result of the Parties' discussions, on October 8, 2015, Defendants produced 324 pages of mostly relevant and material, albeit previously undisclosed, new documents, as well as amended objections and responses to Plaintiffs' requests for production for documents, including documents responsive to certain requests for production of documents not specifically addressed in Plaintiffs' original motion to compel. *See* Exhibits Q and R.

36. However, several issues remain unresolved or only partially resolved, as detailed in the Parties' October 10, 2015 Joint Status Report and in this motion. *See* Docket No. 54.

37. Defendants have never sought or obtained a protective order regarding Plaintiffs' deposition topics and requests seeking information that Defendants contend is confidential, proprietary, and/or trade secret, yet Defendants have not served Plaintiffs with any privilege log regarding such information, and Defendants have refused to make any 30(b)(6) witness available for deposition.

38. Similarly, Defendants have not offered any dates for the deposition of certain fact witnesses Plaintiffs have identified, despite Plaintiffs' requests more than three weeks prior to the filing of this motion.

39. On December 31, 2015 Plaintiffs requested that Defendant provide dates when they would make certain fact witnesses available for deposition and dates for Rule 30(b)(6) depositions. Defendants did not respond to this inquiry, despite Plaintiffs following up on January 21, 2015, until January 22, 2015.

40. On January 22, 2016, Plaintiffs noticed Defendants of their intent to depose Rule 30(b)(6) representatives for both Chase and Wells Fargo on March 2, 2016 and March 3, 2016, respectively, and fact witness, Chase employee LaRetha Hogg, on February 24, 2016. *See* Exhibits S, T and U.

41. Also on January 22, 2016, counsel for Defendants notified Plaintiffs of their intent to withhold production of Rule 30(b)(6) representatives for deposition until the Court rules on the outstanding discovery issues presented in this motion, specifically those regarding Defendants' policies and procedures.

III. ARGUMENT & AUTHORITIES

42. As discussed *supra* and in the Parties' October 9, 2015 Joint Status Report, Chase has not provided complete responses to Plaintiffs' requests for production and continues to assert an array of privileges without providing the required privilege log or obtaining a protective order. Additionally, Chase has ignored Plaintiffs' offer to enter into an agreed protective order regarding the policy and procedure information Chase refuses to produce. Further, Wells Fargo has not produced a single document on its own behalf and simply refers to the documents produced by Chase. While Plaintiffs did receive amended discovery responses from Defendants including more

detailed objections, many still include boilerplate objections or claims of privilege without a proper privilege log or protective order.[3]

43. Plaintiffs are entitled to discovery as to "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case [including] a variety of fact-oriented issues [which] may arise during litigation that are not related to the merits." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). It is Defendants' burden to persuade the Court that the information it has refused to provide is outside the broad scope of discovery. *Merrill v. Waffle House, Inc.*, 227 F.R.D. 475, 478 (N.D. Tex. 2005).

44. Moreover, relevance in the context of discovery is construed more liberally than at trial. Thus, information which is reasonably likely to lead to other matter which could bear on any issue that is or may be in the case is relevant. *Chao v. Primary Health Services Center*, 2008 WL 2271485, at *1 (W.D. La. May 30, 2008) ("[f]ederal Rule of Civil Procedure 26(b)(1), which provides that '[p]arties may obtain discovery regarding any matter, not privileged that is relevant to the claim or defense of any party,' has been understood as providing for broad and liberal discovery. Thus, the scope of discovery is not limited only to evidence that would be admissible at trial, nor is it adjudged by a constricted definition of 'relevant.'")(citations omitted)). Indeed, discovery of inadmissible evidence is permissible if it is reasonably calculated to lead to admissible evidence. *United States v. Holley*, 942 F.2d 916, 924 (5th Cir. 1991).

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[3] For example, in response to Plaintiffs' Request No. 10 for *non-privileged* correspondence between Chase employees relating to the Plaintiffs' loan, Chase asserts both attorney-client and work-product privileges. *See* Exhibit P. Chase also objects to non-fact-based requests stating they assume facts in dispute (Request Nos. 14, 19, and 20), objects to terms such as "relating" and "concerning" as vague and ambiguous (Request Nos. 7 and 10), objects to requests for explanation of common servicing codes as overbroad and burdensome (Request Nos. 17 and 22), and denies the existence of a specific document while also identifying it by name in response to the same request (Request No. 3). *Id.* Further, Chase claims that eight of Plaintiffs' production requests regard "confidential and proprietary" information; however, no log has been provided to Plaintiffs identifying the responsive documents Defendants' claim should be protected. *Id.* Chase also asserts attorney-client and work-product privileges throughout their responses, again, without identifying such privileged documents. *Id.*

45. Furthermore, without a protective order, the Federal Rules do not recognize a privilege for evidence that a party unilaterally deems confidential, proprietary, or trade secret. *In re Natta*, 264 F.Supp. 734 (D.C. Del.1967), *aff'd*, 388 F.2d 215 (3rd Cir. 1968); *Paul v. Sinnott*, 217 F.Supp. 84 (W.D.Pa.1963); *U.S. v. National Steel Corp*., 26 F.R.D. 603 (S.D. Tex. 1960), *Natta v. Zletz,* 405 F.2d 99 (7th Cir. 1968), *cert. denied,* 395 U.S. 909 (1968). The Federal Rules of Civil Procedure only allow litigants to avoid or modify their duty to produce relevant evidence responsive to Plaintiffs' discovery requests if they *first* obtain a protective order under Fed. R. Civ. P. 26(c), which requires the party seeking the protection to establish "good cause" for the Court to grant such an order. The burden is on the party requesting the protective order to show the necessity of its issuance, "which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *In re Terra Int'l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998). Good cause has been defined by other courts as a showing that disclosure of the information will work "a clearly defined, serious and specific injury to the party seeking closure." *Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 786 (3d Cir. 1994)(citing *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984)). Further, "broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing." *Id*. Additionally, this burden of justifying the confidential nature of information or documents must be satisfied for "each and every document sought to be covered by a protective order." *Id* at 786-787.

46. Defendants claim Plaintiffs are on a "fishing expedition" with regard to Plaintiffs requests for policies and procedures and instances of similar conduct by Chase, without providing solid facts or law to substantiate their claims of irrelevance or otherwise prove that the information sought is outside of the scope of discovery. As explained *infra,* Plaintiffs are asking the Court in

this case to find that Defendants violated federal and state debt collection laws, violated RESPA and TILA, breached the terms of the note and deed of trust, committed common law fraud, and committed negligent and grossly negligent actions, and to award Plaintiffs damages, including but not limited to actual damages, punitive and exemplary damages and sanctions, attorneys' fees, and injunctive relief. Defendant's policies and procedures are particularly relevant to the relief Plaintiffs seek because this information is necessary to support their claims for violations of RESPA and TILA and their requests for sanctions and punitive and exemplary damages. Further, whether or not Plaintiffs have established liability with regard to the actions alleged specific to Plaintiffs' loan does not preclude discovery on Plaintiffs' claims and available damages. Indeed, the purpose of discovery is to provide parties with information in the possession of others that may be used to substantiate their claims and defenses, and Defendant has withheld information highly relevant to Plaintiffs' claims for over a year. Plaintiffs' requests were formulated to discover specific information relevant to Defendants' conduct alleged, as opposed to "casting about in the dark" as Defendants assert in the Joint Status Report.

A. Plaintiffs are entitled to Defendants' disclosures under Fed. R. Civ. P. 26.

47. Rule 26(a)(1) requires Defendants to provide Plaintiffs with

> "(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information -- along with the subjects of that information -- that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
>
> (ii) a copy -- or a description by category and location -- of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment." *Id.*

48. Defendants have failed to make any Rule 26(a) disclosures in this case, despite being specifically informed of this deficiency as recently as December 16, 2015.[4]

B. Plaintiffs are entitled to appropriate discovery responses and production relevant to Plaintiffs' loan account under Fed. R. Civ. P. 26(b) and 34.

49. Defendants have continued to refuse to respond or fully respond to several of Plaintiffs' requests for production.

50. Request for Production No. 11 for Chase requests all collection notes and call logs relating to the Plaintiffs' account. Defendants amended Chase's response to this request and produced additional documents responsive to this request via email to Plaintiffs on October 8, 2015. Thus far, Defendants have only produced full servicing notes for 2015, rather than from 2009 through the Present, as requested by Plaintiffs. In particular, the production lacks the consolidated servicing notes contained in screens entitled "NOTS" and "LMT3" in Chase's MSP servicing system of record, as well as any other servicing notes, from 2009 through 2014.

51. Request for Production No. 12 for Chase requests documentation relating to Chase's decisions to deny Plaintiffs' requests for loan modification, and request for production number 19 to Chase requests documents related to consideration of loan modification applications. Defendants amended Chase's responses to this request and provided citation to specific previously-produced documents and also produced additional documents that Chase contends are responsive to this request via email to Plaintiffs on October 8, 2015. However, Defendants have only produced modification summary reports and other documents related to the Plaintiffs' modification application reviewed on September 29, 2011, and related to Chase's modification

[4] Defendants' failure to make *any* Rule 26(a) disclosures in this case is particularly astonishing, considering that the Court directed counsel for the Parties to read *Heller v. City of Dallas*, 303 F.R.D. 466 (N.D. Tex. 2014), in the courtroom prior to conferring regarding the discovery disputes in this case, and *Heller*, of course, resulted in sanctions awarded against the City of Dallas for failing to comply with Rule 26.

review that took place in 2015, after this lawsuit was filed. Defendants have not produced any documents relating to Plaintiffs' initial application in 2010, the trial modification offered to Plaintiffs in 2010, and Plaintiffs' multiple subsequent modification applications in between, as detailed in Plaintiffs' complaint.

C. Plaintiffs are entitled to discovery regarding Chase's policies and procedures related to servicing Plaintiffs' mortgage loan.

52. Defendants have withheld policy and procedure information without providing a privilege log as specifically required by this Court's September 11, 2015 order and Fed. R. Civ. P. 26(b)(5)(ii). Defendants have also failed to meet their burden to provide evidentiary support for their claims that the information that Plaintiffs seek is confidential and proprietary. As to Plaintiffs' requests for policies and procedures and for any other information Defendants contend is confidential, Defendants have failed to meet their burden. *See Church v. Accretive Health, Inc.*, 2015 WL 7572338 at 2* (S.D. Ala. November 24, 2015) (party seeking to restrict public access to documents bears the burden to show the Rule 26 good cause balancing test is satisfied with respect to each item).

53. Request for Production No. 13, deposition topic 2, and deposition document request 2 to Chase seek Chase's policies and procedures for servicing Plaintiffs' mortgage loan. Plaintiffs have offered to narrow these requests to include only policies and procedures that are directly applicable to Defendants' servicing of Plaintiffs' mortgage loan account for the time period at issue in Plaintiffs' complaint. Plaintiffs have also offered to enter into a protective order to address Defendants' confidentiality concerns (although Plaintiffs do not concede that these concerns are valid or well-founded).[5] *See* Docket No. 27-1, p. 105-113.

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[5] Defendant Chase has produced similar policy and procedure documents without a protective order in other cases. *See* Exhibit V, a guide for new employees relating to foreclosure procedures produced by Chase and available publically at https://www.judiciary.state.nj.us/superior/f_59553_10_jp_morgan/jp_morgan_15_of_21.pdf.

54. In particular, the evidence Plaintiffs seek to obtain through these requests is relevant to Plaintiffs' negligence claims and claims for statutory damages under RESPA, as well as Plaintiffs' claims for exemplary and/or punitive damages. *Blankenchip v. CitiMortgage, Inc.*, 2015 WL 5009079 at *2-4 (E.D. Cal. Aug. 20, 2015) (Plaintiffs entitled to discovery regarding defendant's policies and practices in case involving similar RESPA violations noting that the plaintiff's litigation and settlement strategy will most likely turn on whether this conduct was done pursuant to policy, or contrary to policy.).

55. Also, in determining the amount of punitive damages, the court must consider the degree of reprehensibility of the Defendants' misconduct. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996). Policies and procedures are especially relevant to analyzing the reprehensibility of Defendants' conduct:

> Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.

Id. at 576-577. Plaintiffs intend to show the Court, through this evidence, that Defendants' conduct with respect to their mortgage loan was part of a larger pattern of misconduct, as opposed to an isolated incident, and Defendants' policies and procedures related to the servicing of Plaintiffs' mortgage loan are directly relevant to that determination. It is also axiomatic that policies and procedures evidence is necessary to evaluate Defendants' bona fide error affirmative defense, particularly with respect to Plaintiffs' FDCPA claims.

D. Plaintiffs are entitled to discovery regarding Chase's policies and procedures related to responding to Qualified Written Requests and Requests for Information.

56. Plaintiffs' request for production number 14, deposition topic 4, and deposition document request 4 to Chase seek Chase's policies and procedures for responding to Qualified Written Request ("QWR") and Request for Information ("RFI") letters under RESPA. Pursuant to 12 U.S.C. § 2605(f)(1), a servicer that fails to comply with the terms of RESPA is liable to the borrower for any actual damages incurred as a result of the servicer's failure to comply and "any additional damages, as the court may allow, in the case of a pattern and practice of noncompliance with the requirements of this section..." 12 U.S.C. § 2605(f)(1). *See Plascencia v. BNC Mortgage, Inc. (In re Plascencia)*, 2012 WL 2161412 at * 7 (Bankr. N.D. Cal. June 12, 2012) (compelling production of mortgage servicer's policies and procedures for compliance with RESPA and TILA because the information requested is relevant to plaintiff's claims); *Hunter v. Green Tree Servicing, LLC (In re Hunter)*, 2014 WL 4555638 at *3 (Bankr. D.S.C. Sept. 12, 2014) (permitting discovery of documents regarding servicer's pattern and practice regarding non-compliance with RESPA); *Quimby v. Caliber Home Loans*, 2015 WL 3751511 at *2 (S.D. Ind. Apr. 22, 2015). Thus, Plaintiffs contend that this information is directly relevant to Plaintiffs' claims regarding Defendants' violations of RESPA, in particular the "pattern or practice of noncompliance" element of Plaintiffs' statutory damages claim.

E. Plaintiffs are entitled to discovery regarding Chase's policies and procedures related to processing and evaluating loan modification applications.

57. Request for Production No. 15 and deposition topic 3 to Chase seek Chase's policies and procedures for evaluating applications for loan modifications. In large part, this case is about Plaintiffs' allegations that Chase kept them in limbo on the modification of their mortgage loan from 2010-2014, and Chase's actions with respect to Plaintiffs' loan modification applications are therefore at the heart of Plaintiffs' claims in this case. As such, whether Chase had appropriate policies and procedures in place to properly evaluate Plaintiffs' loan modification applications,

and whether Chase complied with those policies and procedures, is directly relevant to Plaintiffs' claims, particularly Plaintiffs' claims for exemplary/punitive damages and Chase's bona fide error defense. This is most clearly demonstrated by the discovery Chase produced which indicates that Plaintiffs' loan modification application was finally denied in March 2015, supposedly due to a conflict with Tex. Const. Art. XVI § 50(a)(6), which was enacted in its current form on November 4, 1997, and the existence of a balloon or lump-sum payment at the end of the loan, as proposed in all possible modification options examined by Chase as indicated by the documents produced by Defendants. Thus, it appears that Defendants knew that Plaintiffs would not be eligible for a loan modification from the outset, since Plaintiffs had a § 50(a)(6) home equity loan, and Chase considered them ineligible for a loan modification without including a balloon payment. If the evidence establishes that Chase knew Plaintiffs could never qualify for a modification under Chase's own investor guidelines, and Chase nevertheless encouraged Plaintiffs to default on their loan and kept them in limbo until their default reached incurable levels, Chase's conduct would satisfy the elements of several of the causes of action Plaintiffs assert in their complaint (fraud, tortious interference with contractual relationships, negligence, gross negligence, RESPA, FDCPA, TDCA, etc.), and this evidence would also defeat Chase's bona fide error affirmative defense.

F. Plaintiffs are entitled to discovery regarding Chase's policies and procedures related to communicating with borrowers represented by counsel.

58. Request for Production No. 16 and deposition topic 1(j) to Chase seek Chase's policies and procedures for communications with borrowers represented by counsel. Plaintiffs allege in their complaint that Chase repeatedly contacted Plaintiffs directly after Chase received notice that Plaintiffs were represented by counsel and contend that such conduct violates the FDCPA. Therefore, whether Chase had appropriate policies and procedures in place to comply

with the requirements of the FDCPA relating to contact with represented parties, and whether Chase complied with those policies and procedures, is directly relevant to Plaintiffs' claims for violations of the FDCPA and to defeating Chase's bona fide error affirmative defense.

G. Plaintiffs are entitled to discovery regarding Chase's policies and procedures for recording and retaining audio recordings of conversations with borrowers.

59. Request for Production Number 30 to Chase seeks Chase's policies and procedures for recording and retention of audio recordings of conversations with borrowers. Defendants claim that they have searched their records for recordings of any calls between Defendants and Plaintiffs, but have found none. The account notes produced by Defendants in this case reflect multiple telephone conversations with Plaintiffs regarding their loan modification application, and these recordings could potentially be vital to Plaintiffs' claims in this case. Based on counsel's experience in mortgage litigation, it would be highly unlikely that such recordings would not exist, and Chase has not specifically denied the existence of such recordings. Chase should be compelled to either produce such recordings or specifically deny their existence and explain why they do not exist for these Plaintiffs.

H. Plaintiffs are entitled to discovery regarding Wells Fargo's policies and procedures regarding oversight by Wells Fargo of the entities servicing Plaintiffs' mortgage loan.

60. Request for Production Number 10, deposition topic 2, and deposition document request 2 to Wells Fargo seek policies and procedures regarding oversight by Wells Fargo of entities servicing Plaintiffs' mortgage loan. Plaintiffs seek this information to determine whether Wells Fargo (as principal) appropriately monitored Chase's actions with respect to Plaintiffs and whether Wells Fargo had, or should have had, knowledge of or consented to Chase's actions. Thus, whether Wells Fargo had appropriate policies and procedures in place regarding the monitoring of Chase's actions (as Wells Fargo's agent) with respect to Plaintiffs' mortgage loan, and whether

Wells Fargo complied with those policies and procedures, is directly relevant to Plaintiffs' claims for exemplary and/or punitive damages. This evidence is also necessary to evaluate and rebut Wells Fargo's bone fide error affirmative defense.

I. Plaintiffs are entitled to discovery regarding Chase's policies and procedures related to the acceleration of Plaintiffs' mortgage loan.

61. Plaintiffs' deposition topic 1(e) to Chase seeks testimony regarding Chase's decision to send Plaintiffs any acceleration notice, and Chase's policies and procedures with respect thereto. Plaintiffs have alleged in their Amended Complaint a statute of limitations defense to the foreclosure counter-claim asserted in this case, based on Plaintiffs' belief that Chase's acceleration of Plaintiffs' mortgage loan occurred more than four years before Defendants filed the foreclosure counter-claim. Although a recent 5th Circuit case based on similar facts rejected that theory of liability, holding that any demand for less than the full accelerated balance of the loan results in deceleration of the loan,[6] Chase's policies related to compliance with Texas law regarding loan acceleration as a condition precedent to foreclosure remain relevant to this case. Specifically, Plaintiffs will seek to supplement their complaint to allege that if the loan was decelerated, Chase did not re-accelerate the loan prior to filing its counter claim for foreclosure, in violation of the deed of trust, Texas law, the FDCPA, and the TDCA, and that Chase's contrary representation in the text of its counter-claim constitutes a false representation in violation of § 1692e of the FDCPA. Plaintiffs thus continue to seek discovery regarding whether and in what manner Defendants contend that they accelerated Plaintiffs' mortgage prior to filing the foreclosure counterclaim in this case, and Chase's policies and procedures with respect to sending acceleration notices thus remain relevant.

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[6] *See Boren v. U.S. National Bank Assoc.*, 807 F. 3d 99 (5th Cir. 2015).

J. Plaintiffs are entitled to discovery regarding the identities of Chase's representatives involved in the processing and consideration of Plaintiffs' loan modification applications, QWRs, default and acceleration letters, and other dispute correspondence.

62. Plaintiffs are entitled to know the identities of material fact witnesses. In addition to Chase's Rule 26 duty to disclose such information, Plaintiffs' deposition topic 1(k) to Chase seeks testimony regarding the identity, responsibilities, and participation of all representatives involved in the processing and consideration of Plaintiffs' loan modification applications. Plaintiffs allege in their original complaint that they spoke with multiple representatives of Chase and EMC regarding the processing and consideration of their loan modification application. Plaintiffs seek this testimony to determine if any of these representatives are additional fact witnesses that Plaintiffs should depose in connection with the prosecution of their claims. Chase has not identified any fact witness in this case who is an employee or representative of Chase with any knowledge of Chase's handling of Plaintiffs' modification applications, QWRs, and other dispute correspondence, or of the reasons or circumstances behind Chase's direct communications with Plaintiffs after receiving notice that Plaintiffs were represented by counsel. Plaintiffs believe the testimony of such witnesses would support their claims for both liability and damages.

K. Plaintiffs are entitled to discovery regarding the Massachusetts class action concerning Chase's loan modification practices.

63. Plaintiffs' deposition topic 1(m) to Chase seeks testimony on the Massachusetts class action regarding Chase's loan modification practices identified in Plaintiffs' complaint. Plaintiffs seek this testimony to determine if Chase has a pattern and practice of engaging in the type of loan modification practices described in Plaintiffs' complaint, and such testimony is directly relevant to Plaintiffs' claims for exemplary and/or punitive damages and Defendants' bona fide error defense. *See, Lopez v. Portfolio Recovery Associates, LLC (In re Lopez)*, 2015 W.L.

5438850 at *3-5 (Bankr. S.D. Tex. Sept. 14, 2015) (admitting plaintiff's exhibits regarding a case from a different state that involved the same defendant being sanctioned and involving substantially similar allegations to those in plaintiff's complaint).

L. Plaintiffs are entitled to information regarding investor modification guidelines applicable to Plaintiffs' mortgage loan.

64. Plaintiffs' deposition topic number 3 to Wells Fargo seeks testimony on investor guidelines for modification of mortgage loans held by Carrington Mortgage Loan Trust, Series 2007-FREI Asset Backed Pass-Through Certificates applicable to the Plaintiffs' mortgage loan. Plaintiffs seek this testimony to determine whether it is (or was) possible to modify Plaintiffs' mortgage loan pursuant to investor modification guidelines in place with respect to Plaintiffs' mortgage loan. Plaintiffs contend that this information is directly relevant to Plaintiffs' claims against Defendants in this case, particularly with respect to Plaintiffs' claims for exemplary and/or punitive damages.

IV. REQUEST FOR SANCTIONS

A. Sanctions are appropriate under Fed. R. Civ. P. 37(b) due to Defendants' failure to comply with the Court's November 3, 2014 and September 11, 2015 orders.

65. Defendants have failed to produce required disclosures under Fed. R. Civ. P. 26(a), as ordered by the Court's November 3, 2014 Scheduling Order (Docket No. 11). Despite requests from Plaintiffs' counsel and Plaintiffs' production of their initial and supplemental disclosures, Defendants still have not provided Rule 26(a) disclosures.

66. Defendants also have not fully complied with the Court's September 11, 2015 order (Docket No. 48). At the hearing on the morning of September 11, 2015, the Court ordered the Parties to read and consider the rulings in *Dondi Properties Corp. v. Commerce Savings & Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988) and *Heller v. City of Dallas*, 303 F.R.D. 466 (N.D. Tex.

2014) in their negotiations to attempt resolution of the outstanding discovery disputes in this case. Defendants' continued failure to provide Rule 26(a) disclosures, refusal to produce complete responses to Plaintiffs' discovery requests, and refusal to produce witness testimony on the noticed topics demonstrates that Defendants' approach to this litigation remains unmodified.

67. Defendants' amended responses to Plaintiffs' requests for production contain many of the same boilerplate objections contained in their original responses. Furthermore, Defendants failed to produce privilege logs for all "documents, communications, or other materials withheld from production on the grounds of attorney-client, work product, or other privilege or immunity," as specifically required by the Court's order and Rule 26(b)(5)(A).

68. A court imposes discovery sanctions to (1) secure compliance with the rules of discovery, (2) deter others from violating them, and (3) punish those who do violate them. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976). The Court should impose sanctions pursuant to Fed. R. Civ. P. 37(b) for Defendant's failure to comply with the Court's orders.

B. Sanctions are appropriate under Fed. R. Civ. P. 37(c) due to Defendants' failure to provide required disclosures under Fed. R. Civ. P. 26(a).

69. Fed. R. Civ. P. 37(c) provides:

> (c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.
>
> (1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
>
> (B) may inform the jury of the party's failure; and
>
> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).

70. As mentioned *supra*, Defendants never provided Plaintiffs with required disclosures under Rule 26(a), despite Plaintiffs' counsel's requests to counsel for Defendants, including as recently as December 16, 2015. Therefore, the Court should order sanctions pursuant to Rule 37(c).

71. Plaintiffs request the Court grant all appropriate and available sanctions against the Defendants for their multiple violations under Rule 37.

V. CONCLUSION

72. For the reasons stated in the foregoing motion, the Court should order Defendants to produce documents responsive to Plaintiffs' requests for production and allow Plaintiffs to obtain Rule 30(6)(b) deposition testimony regarding the deposition topics noticed in Plaintiffs' January 22, 2015 deposition notices (renewing the same topics included in the February 25, 2015 notices and at issue in this discovery dispute). Defendants have failed to meet their burden to establish that the information they are refusing to produce is actually confidential, proprietary, or trade secret information. Defendants have not offered any evidence of a specific harm Defendants would suffer if the information was disclosed and have otherwise failed to establish that good cause exists for the Court to grant a protective order to prevent the disclosure of this information.

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request that the Court enter an order compelling Defendants to produce documents fully responsive to the Plaintiffs' Requests for Production as described in this motion, ordering Defendants to produce deponents for deposition on the topics as noticed in Plaintiffs' January 22, 2016 deposition notices, and imposing sanctions pursuant to Fed. R. Civ. P. 26 and 37, and for all such other and further relief to which Plaintiffs are entitled at law or in equity.

Respectfully submitted,

ARMSTRONG KELLETT BARTHOLOW PLLC

/s/ Theodore O. Bartholow, III ("Thad")
Theodore O. Bartholow, III ("Thad")
Texas Bar No. 24062602
Karen L. Kellett
Texas Bar No. 11199520
Caitlyn N. Wells
Texas Bar No. 24070635
Megan F. Clontz
Texas Bar No. 24069703
11300 N. Central Expressway, Suite 301
Dallas, Texas 75243
Telephone: (214) 696-9000
Facsimile: (214) 696-9001
thad@akbpc.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the parties listed below via electronic mail on January 26, 2016.

/s/ Theodore O. Bartholow, III ("Thad")
Theodore O. Bartholow, III ("Thad")

Adam Nunnallee
Dykema Cox Smith
1717 Main Street, Suite 4200
Dallas, Texas 75201

Attorneys for Defendants

CERTIFICATE OF CONFERENCE

I hereby certify that on January 22, 2016, counsel for Plaintiffs conferred with counsel for Defendants, Adam Nunnallee and Thomas Hanson, and parties were unable to reach a resolution regarding the matters contained in Plaintiffs' Second Motion to Compel and Motion for Sanctions.

/s/ Theodore O. Bartholow, III ("Thad")
Theodore O. Bartholow, III ("Thad")